A

ROHADI SABTU

v.

PP

B

HIGH COURT MALAYA, KUALA LUMPUR
LIM YEE LAN JC
[CRIMINAL APPLICATION NO: 44-102-2006]
10 OCTOBER 2006

C ***CRIMINAL PROCEDURE:*** *Sentence - Stay of execution - Stay of execution of sentence pending appeal - Principles - Special or exceptional circumstances - Whether special circumstances shown - Criminal Procedure Code, s. 311*

Before the Sessions Court, the applicant was convicted of two offences
D under s. 471 Penal Code and was sentenced to 10 years' imprisonment in respect of each conviction, the sentences to run concurrently. The applicant appealed and pending that applied for a stay of execution of the sentences passed against him. Before the learned Judicial Commissioner, the applicant argued that stay ought to be granted as he
E was a first offender, and being the sole breadwinner, his family would suffer much hardship during his absence. The prosecution objected arguing that grant of stay is not justified considering the seriousness of the offence with which the applicant had been convicted, the probability that the appeal would be heard by the High Court before any substantial
F part of the sentence would have to be served, and the applicant's failure to show good grounds for succeeding in the appeal.

Held (refusing stay):

(1) The grant of a stay of execution of a sentence pending appeal is an
G exception to the general rule and in every application there must be shown some special or exceptional circumstances before the discretion of the court can be exercised in favour of an applicant. The factors that may constitute special circumstances are not exhaustive and no one single factor can have a determinative effect. Further, the court must bear in mind the strong social reasons of
H not raising the applicant's hopes by granting bail, for, if the applicant were unsuccessful in the appeal, he would suffer all the more when those hopes were dashed and he is returned to custody to serve the sentence. (paras 5 & 6)

I **(2)** It would appear that only one factor leans in the applicant's favour, namely the fact that he is a first offender. On the other hand, there are three factors why the applicant should not be granted bail

pending his appeal. In any case, the family problems raised in the applicant's affidavit do not constitute exceptional circumstances. These circumstances can be considered in favour of the applicant if the other circumstances are also titled towards him, but that is not the case here. As was said by Augustine Paul JCA (as he then was) in *KWK (A Child) v. PP* "undue weight granted to matters that are personal to the applicant would mean that the special circumstances to be proved have been sacrificed at the altar of sympathy". (paras 7 & 8)

Case(s) referred to:
KWK (A child) v. PP [2003] 4 CLJ 51 CA ***(refd)***
Re Kwan Wah Yip & Anor [1954] 1 LNS 78 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 311
Penal Code, ss. 467, 471

For the applicant - Rodzim Zaimy Abdul Hamid; M/s Elida, Imran & Partners
For the prosecution - Yusaini Amer Abd Karim; DPP

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Lim Yee Lan JC:

[1] On 7 June 2006, the applicant was convicted by the Kuala Lumpur Sessions Court 3 under two charges of having dishonestly used two cheques with face value of RM10,000 and RM15,000 respectively which he had reason to believe to be forged, as genuine, being an offence under s. 471 and punishable under s. 467 of the Penal Code. He was sentenced to a term of ten years imprisonment in respect of each charge and the sentences were to run concurrently.

[2] The applicant's application for a stay of execution of his sentence was rejected by the said Sessions Court judge. The applicant then filed his appeal against his conviction and sentence to the Kuala Lumpur High Court on 9 June 2006. By a notice of motion filed on 24 August 2006, he has applied to this court to be released on a bail pending the disposal of his appeal by the High Court.

[3] Having considered the submission of the learned defence counsel, Encik Rodzim Zaimy bin Abdul Hamid and the learned Deputy Public Prosecutor, Encik Yusaini Amer bin Abdul Karim and the authorities cited by them, I hereby dismiss the motion based on the following grounds:

[4] The law relating to the stay of execution of a sentence after conviction of an offender and pending his appeal is governed by s. 311 of the Criminal Procedure Code which provides that no appeal shall operate as a stay of execution of a sentence (except in the case of a sentence of whipping) but the court below or a judge may grant a stay of execution on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the judgment, order, conviction as to the court below or to the judge may seem reasonable.

[5] It is clear from the decided cases cited to this court by both parties that the grant of a stay of execution of a sentence pending appeal is an exception to the general rule and in every application there must be shown some special or exceptional circumstances before the discretion of the court can be exercised in favour of an applicant. The factors that may constitute special circumstances to justify the grant of a stay of execution of a sentence after conviction are well settled and as enumerated in *Re Kwan Wah Yip & Anor* [1954] 20 MLJ 146, at p. 148 and re-iterated in the decision of the Court of Appeal in *KWK (A child) v. PP* [2003] 4 CLJ 51. These factors are as follows:

(a) the gravity or otherwise of the offence;

(b) the length of the term of imprisonment; in comparison with the length of time which is likely to take for the appeal to be heard;

(c) whether there are difficult points of law involved;

(d) whether the accused is a first offender or has previous convictions;

(e) whether the accused would become involved again in another offence whilst at liberty;

(f) whether the security imposed will ensure the attendance of the appellant before the appellate court.

[6] It was held that the list enumerated above is not exhaustive and not one single factor can have a determinative effect on the decision to be made. It is the cumulative effect of all the factors that matters. However, in considering an application for stay the court must also bear in mind the strong social reasons why an applicant's hopes should not be raised by the grant of bail for, if unsuccessful in his appeal, he will suffer all the more when those hopes are dashed and he is returned to custody to serve the sentence previously imposed on him.

[7] Based on the affidavit of the applicant in support of his application, it would appear to this court that only one factor leans in his favour, that is, the fact that he was a first offender. On the other hand, I agreed with the prosecution that there are three factors why the applicant should not be granted bail pending his appeal and they are, firstly, that he had been convicted of an offence under s. 471 of the Penal Code which is a very serious offence as seen by the maximum term of imprisonment of 20 years specified in s. 467; secondly, it is noted that the applicant's notice of appeal against his conviction has just been filed on 9 June 2006 and is therefore at a very early stage. In most cases, appeals from the Kuala Lumpur Sessions Courts to the High Court take about a year before they are set down for hearing before the High Court. In view of the ten years imprisonment imposed by the Sessions Court on each charge, the likelihood that the applicant will have served the whole or a very substantial part of his term of imprisonment before his appeal is heard by the Kuala Lumpur High Court does not arise, and thirdly, the applicant has failed to demonstrate to this court that he has good grounds for succeeding in his appeal. The fact that the applicant has filed an appeal does not necessarily mean that he has good grounds for succeeding in the appeal. On the contrary, as stated by Spencer Wilkenson J in *Re Kwan Wah Yip & Anor (supra)* at p. 147:

> In my opinion once a person has been convicted by a court of competent jurisdiction it must be assumed in the absence of any obvious defect on the face of the record, that he has been rightly convicted unless and until the conviction is set aside.

[8] No doubt the applicant has raised some family problems in his affidavit in support of his application and these are the financial hardship faced by the family during his absence as he was the sole bread-winner of the family and the deteriorating health of his mother. He also enclosed the latest medical report on his wife's recent illness. In my considered opinion, the family problems of the applicant as raised in his affidavit are matters provocative of sympathy but they do not constitute exceptional circumstances for the grant of a stay of his sentence. It was opined by Augustine Paul JCA (as he then was) in *KWK (A child) v. PP (supra)* at p. 67 that 'undue weight granted to matters that are personal to the applicant would mean that the special circumstances to be proved have been sacrificed at the altar of sympathy'. Of course these circumstances can be considered in favour of the applicant if the other circumstances are also tilted towards him, which is not so in the present case, because as stated earlier, there was only one factor in his favour and that was the fact that he was a first offender.

[9] Based on the foregoing reasons, this court is of the considered view that that there are no special circumstances to justify the grant of bail to the applicant pending the disposal of his appeal against his sentence as imposed by the Kuala Lumpur Sessions Court 3 and his application is hereby dismissed.